APPENDIX A:

Opinion of the United States Court of Appeals for the Ninth Circuit (Officially Reported in 298 F. 2d (Adv.) 641).

United States Court of Appeals for the Ninth Circuit.

Stanley E. Henwood, Richard I. Roemer, Lewis M. Poe, individually, as members of the United Industrial Corporation Stockholders' Protective Committee and as proxies of said Committee, James V. Armogida, Robert G. Ballance, Fred A. Beshara, Nathaniel R. Dumont, Joe L. Foss, William D. Lawry, Elmer M. Luther, Jr., Edward H. McLaughlin, Charles Soderstrom, John A. Steel, Clarence L. Summers, Roy L. Williams, Louis W. Wulfekuhler, Alfred T. Zodda, individually and as members of the United Industrial Corporation Stockholders' Protective Committee, Bernard F. Gira and Herbert J. Petersen, and United Industrial Corporation, a corporation, Defendants and Appellants, vs. Securities and Exchange Commission, Plaintiff and Appellee, and United Industrial Corporation, Defendant and Appellee. No. 17,591. Jan. 17, 1962.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Hamlin, Circuit Judges; and Solomon, District Judge.

Per Curiam:

This action was brought by the Securities and Exchange Commission[1] for alleged violation on the part of appellants of Section 14(a) of the Securities and Exchange Act of 1934 (15 U.S.C. §78n(a)) and of

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[1]Hereinafter referred to sometimes as SEC. United Industrial Corporation is sometimes referred to herein as UIC.

Regulation 14, 17 C.F.R. §240.14, promulgated thereunder. Jurisdiction below rested on 15 U.S.C. §78(aa). This court has jurisdiction to review the judgment and permanent restraining order issued below.

In this action, time is of the essence. We have examined with great care the six briefs, with their appendices, which have been filed herein. We have examined with care so much of the voluminous nineteen volume record as was specifically brought to our attention in the briefs and oral argument, and which we deem necessary for an understanding of the action.

We hold that there exists sufficient evidence in the record to affirm some, but not all, of the findings of fact and conclusions of law based thereon made by the trial judge. We therefore modify the judgment rendered below to read as follows:

"I.

"IT IS ORDERED, ADJUDGED AND DECREED that the defendants United Industrial Corporation Stockholders' Protective Committee, Stanley E. Henwood, Richard I. Roemer, and Lewis M. Poe, individually and as members of and proxies for said Stockholders' Protective Committee, associates, substitutes, agents, employees and attorneys of said Stockholders' Protective Committee, and the defendants Bernard F. Gira and Herbert J. Petersen, their agents, employees, and attorneys, and all persons acting in concert or participation with any of said defendants, be and they hereby are permanently restrained and enjoined from, directly or indirectly, making use of the mails or any means or instrumentality of interstate commerce or of any facility of any national securities

exchange to solicit or to permit the use of their names to solicit any proxy in respect of the common or preferred stock of UIC, or otherwise soliciting any such proxy, by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which at the time and in the light of the circumstances under which it is made is false and misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading, or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy which has been or has become false or misleading, including the following:

(i) omitting to state that the defendants Bernard F. Gira and Herbert J. Petersen were either directly or indirectly instrumental in initialing the UIC Stockholders' Protective Committee and in securing one or more of the slate of directors for membership on the board of directors of UIC, in opposition to the slate of directors formulated by the management of UIC;

(ii) omitting to state that the defendants Bernard F. Gira and Herbert J. Petersen have participated with representatives of the Stockholders' Protective Committee and aided said Committee and its representatives in conducting proxy solicitations in opposition to the management of UIC;

(iii) stating that the defendants Bernard F. Gira and Herbert J. Petersen are not participating with the Stockholders' Protective Committee

in soliciting proxies in opposition to the management of UIC;

(iv) stating that the formation of the Stockholders' Protective Committee was initiated solely as a result of complaints of the defendants Elmer M. Luther, Jr. and Roy L. Williams;

(v) stating that certain losses sustained by UIC and diminution of stockholders' equity occurred during the time that Bernard F. Fein was Chairman of the Executive Committee;

or voting any proxy of any stockholder of UIC now held by the defendants UIC Stockholders' Protective Committee, Stanley E. Henwood, Richard I. Roemer or Lewis M. Poe as proxies for said Committee, or any substitute for any such proxy holder or voting any such proxy which is not received pursuant to a solicitation made subsequent to the entry of this decree, in accordance with Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a), and Regulation 14, 17 C.F.R. 240.14.

II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants Bernard F. Gira and Herbert J. Petersen shall and they hereby are commanded to comply with Rule 14a-11 of Regulation 14, 17 C.F.R. 240.14a-11, by filing with the Securities and Exchange Commission and with each national securities exchange upon which the common or preferred stock of United Industrial Corporation is registered a correct statement in duplicate containing the information specified by Schedule 14B of Regulation 14, concerning their

participation in the solicitation of proxies in respect of the common and preferred stock of UIC.

III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant United Industrial Corporation, its officers, directors, employees, and attorneys, and each of them, be and they hereby are restrained and enjoined from holding any meeting of stockholders of United Industrial Corporation, except for the purpose of adjournment, until sixty days after this decree becomes final.

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action be and the same is hereby dismissed, without prejudice, as to the defendants James V. Armogida, Robert G. Ballance, Fred A. Beshara, Nathaniel R. Dumont, Joe L. Foss, William David Lawry, Elmer M. Luther, Jr., Edward H. McLaughlin, Charles Soderstrom, John Autry Steel, Clarence L. Summers, Roy L. Williams, Louis W. Wulfekuhler and Alfred T. Zodda, individually and as members of the United Industrial Corporation Stockholders' Protective Committee."

We agree with the findings of fact in part only. In view of the fact, however, that no stockholders' meeting of the United Industrial Corporation has been held for some months, pending determination of this litigation, we refrain from elaborating on the deficiencies of the findings.

As hereinabove modified, the judgment is *affirmed*.

(Endorsed) Per Curiam Opinion Filed Jan. 17, 1962.
Frank H. Schmid, Clerk.

APPENDIX B.

Section 78aa. Jurisdiction of Offenses and Suits.

The district courts of the United States, the United States District Court for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts. June 6, 1934, c. 404, Sec. 27, 48 Stat. 902; June 25, 1936, c. 804, 49 Stat. 1921, June 25, 1948, c. 646, Sec. 32 (b), 62 Stat. 991; May 24, 1949, c. 139, Sec. 127, 63 Stat. 107.

APPENDIX C.

Section 78n. Proxies.

(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

APPENDIX D.

Rule 14, Securities and Exchange Commission.

"No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

"Note. The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this rule:

"(a) Predictions as to specific future market values, earnings, or dividends.

"(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper illegal or immoral conduct or associations, without factual foundation.

"(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

"(d) Claims made prior to a meeting regarding the results of a solicitation."

Regulation 14(a)-11 Under the Securities and Exchange Act of 1934:

"Rule 14a-11. Special Provisions Applicable to Election Contests.

"(a) Solicitations to which this rule applies.

"This rule applies to any solicitation subject to this regulation by any person or group of persons for the purpose of opposing a solicitation subject to this regulation by any other person or group of persons with respect to the election or removal of directors at any annual or special meeting of security holders.

"(b) Participant or Participant in a Solicitation.

"For purposes of this rule the term 'participant' and 'participant in a solicitation' include the following:

"(1) the issuer;

"(2) any director of the issuer, and any nominee for whose election as a director proxies are solicited;

"(3) any committee or group which solicits proxies, any member of such committee or group, and any person whether or not named as a member who, acting alone or with one or more other persons, directly or indirectly, take the initiative in organizing, directing or financing any such committee or group;

"(4) any person who finances or joins with another to finance the solicitation of proxies, except persons who contribute not more than $500 and who are not otherwise participants;

"(5) any person who lends money or furnishes credit or enters into any other arrangements, pursuant to any contract or understanding with a participant, for the purpose of financing or otherwise inducing the purchase, sale, holding or voting of securities of the issuer

by any participant or other persons, in support of or in opposition to a participant; except that such terms do not include a bank, broker or dealer who, in the ordinary course of business, lends money or executes orders for the purchase or sale of securities and who is not otherwise a participant;

"(6) any other person who solicits proxies: *Provided, however,* That such terms do not include (i) any person or organization retained or employed by a participant to solicit security holders, or any person who merely transmits proxy soliciting material or performs ministerial or clerical duties; (ii) any person employed by a participant in the capacity of attorney, accountant, or advertising, public relations or financial adviser, and whose activities are limited to the performance of his duties in the course of such employment; (iii) any person regularly employed as an officer or employee of the issuer or any of its subsidiaries who is not otherwise a participant; or (iv) any officer or director of, or any person regularly employed by, any other participant, if such officer, director, or employee is not otherwise a participant.

"(c) Filing of Information Required by Schedule 14B.

"(1) No solicitation subject to this rule shall be made by any person other than the management of an issuer unless at least five business days prior thereto, or such shorter period as the Commission may authorize upon a showing of good cause therefor, there has been filed, with the Commission and with each national securities exchange upon which any security of the issuer is listed and registered, by or on behalf of each participant in such solicitation, a statement in

duplicate containing the information specified by Schedule 14B.

"(2) Within five business days after a soliciation subject to this rule is made by the management of an issuer, or such longer period as the Commission may authorize upon a showing of good cause therefor, there shall be filed, with the Commission and with each national securities exchange upon which any security of the issuer is listed and registered, by or on behalf of each participant in such solicitation, other than the issuer a statement in duplicate containing the information specified by Schedule 14B.

"(3) If any solicitation on behalf of management or any other person has been made, or if proxy material is ready for distribution, prior to a solicitation subject to this rule in opposition thereto, a statement in duplicate containing the information specified in Schedule 14B shall be filed by or on behalf of each participant in such prior solicitation, other than the issuer, as soon as reasonably practicable after the commencement of the solicitation in opposition thereto, with the Commission and with each national securities exchange on which any security of the issuer is listed and registered.

"(4) If, subsequent to the filing of the statements required by subparagraphs (1), (2), and (3) above, additional persons become participants in a solicitation subject to this rule, there shall be filed, with the Commission and each appropriate exchange, by or on behalf of each such person a statement in duplicate containing the information specified by Schedule 14B, within three business days after such person becomes a participant, or such longer period as the Commission may authorize upon a showing of good cause therefor.

"(5) If any material change occurs in the facts reported in any statement filed by or on behalf of any participant, and appropriate amendment to such statement shall be filed promptly with the Commission and each appropriate exchange.

"(6) Each statement and amendment thereto filed pursuant to this paragraph (c) shall be part of the official public files of the Commission and for purposes of this regulation shall be deemed a communication subject to the provisions of Rule 14a-9.

"(d) Solicitations Prior to Furnishing Required Written Proxy Statement.

"Notwithstanding the provisions of Rule 14a-3 (a), a solicitation subject to this rule may be made prior to furnishing security holders a written proxy statement containing the information specified in Schedule 14A with respect to such solicitation, *Provided* That—

"(1) The statements required by paragraph (c) of this rule are filed by or on behalf of each participant in such solicitation.

"(2) No form of proxy is furnished to security holders prior to the time the written proxy statement is required by Rule 14a-3 (a) is furnished to security holders: *Provided, however,* That this subparagraph (2) shall not apply where a proxy statement then meeting the requirements of Schedule 14A has been furnished to security holders.

"(3) At least the information specified in Items 2-(a) and 3(a) of the statement required by paragraph (c) to be filed by each participant; or an appropriate summary thereof, is included in each communication sent or given to security holders in connection with the solicitation.

"(4) A written proxy statement containing the information specified in Schedule 14A with respect to a solicitation is set or given security holders at the earliest practicable date.

"(e) Solicitations prior to furnishing required written proxy statement—Filing Requirements.

"Three copies of any soliciting material proposed to be sent or given to security holders prior to the furnishings of the written proxy statement required by Rule 14a-3 (a) shall be filed with the Commission in preliminary form, at least five business days prior to the date definitive copies of such material are first sent or given to security holders, or such shorter period as the Commission may authorize upon a showing of good cause therefor.

(f) Application of this rule to Annual Report.

Notwithstanding the provisions of Rule 14a-3 (b) and (c), three copies of any portion of the annual report referred to in Rule 14a-3 (b) which comments upon or refers to any solicitation subject to this rule, or to any participant in any such solicitation, other than the solicitation by the management, shall be filed with the Commission as proxy material subject to this regulation. Such portion of the annual report shall be filed with the Commission in preliminary form at least five business days prior to the date copies of the report are first sent or given to security holders.

"(g) Application of Rule 14a-6.

"The provisions of paragraphs (c), (d), (e), (f) and (g) of Rule 14a-6 shall apply to the extent pertinent to soliciting material subject to paragraphs (e) and (f) of this Rule 14a-11.

"(h) Use of reprints or reproductions.

"In any solicitation subject to this rule, solicitating material which includes, in whole or part, any reprints or reproductions of any previously published material shall:

"(1) State the name of the author and publication, the date of prior publication, and identify any person who is quoted without being named in the previously published material.

"(2) Except in the case of a public official document or statement, state whether or not the consent of the author and publication has been obtained to the use of the previously published material as proxy soliciting material.

"(3) If any participant using the previously published material, or anyone on his behalf, paid, directly or indirectly, for the preparation or prior publication of the previously published material, or has made or proposes to make any payments or give any other consideration in connection with the publication or republication of such material, state the circumstances."

APPENDIX E.

Motion for Modification of Judgment and Order Incorporating Affidavit of J. J. Brandlin by Reference.

United States Court of Appeals for the Ninth Circuit.

Stanley E. Henwood, et al., Appellants, vs. Securities and Exchange Commission, et al., Appellees. No. 17,-591.

Mark P. Robinson
Vaughan, Brandlin, Baggot,
Robinson & Roemer and
Morris Lavine
411 West Fifth Street
Los Angeles 13, California
Attorneys for Appellants
Stockholders' Protective Committee

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MAdison 7-3241

COMES NOW the defendants and appellants above named and move this Honorable Court to modify its judgment and order affirming a judgment of the District Court voiding all the proxies heretofore secured by the above named defendants and requesting this court to allow the proxies to stand provided the stockholders who gave the proxies are notified as to the additional matter which the court stated should have

been contained in statements to them heretofore sent. The movants set forth as grounds herein that the voiding of the proxies without further opportunity to correct the omission found by the District Court is too severe, too costly and inequitable; that in injunctive process you never go beyond the necessities of the case and only to the extent required to preserve the rights of all parties.

Enos v. Harmon, 157 Cal. App. 2d 746, 321 P. 2d 810

Anderson v. Souza, 243 P. 2d 947

Sontag Chain Stores Company v. Superior Court, 18 Cal. 2d 92, 28 Am. Jur. 485.

Injunction is an equitable remedy and should be administered with equitable principles. Although injunction is the strong arm of equity, it should be administered only with the strength required to do equity and justice. This can be accomplished by modifying the order to permit sending out the additional information set out in the court's opinion and pursuant to the affidavit of J. J. BRANDLIN attached hereto and made a part hereof as though fully set out.

This motion is based upon all the records and files and proceedings heretofore had and the affidavit of J. J. BRANDLIN incorporated herein as though fully set out.

WHEREFORE defendants and appellants move this Honorable Court to modify the judgment by omitting the nullification of the proxies and req.. ing only that

the STOCKHOLDERS' PROTECTIVE COMMITTEE convey to the stockholders that information contained in this court's per curiam decision.

Dated this 8th day of February, 1962.

Respectfully submitted,

/s/ Mark Robinson
MARK ROBINSON

/s/ Morris Lavine
MORRIS LAVINE

Attorneys for Defendants and Appellants.

AFFIDAVIT
OF
J. J. BRANDLIN

United States Court of Appeals for the Ninth Circuit.

Stanley E. Henwood, et al., Defendants and Appellants, vs. Securities and Exchange Commission, Plaintiff and Appellee, and United Industrial Corporation, Defendant and Appellee. No. 17,591.

State of California, County of Los Angeles—ss.

J. J. BRANDLIN, being first duly sworn, deposes and says:

That he is an attorney at law, admitted to practice in the State of California and before the United States District Court for the Southern District of California and the United States Court of Appeals for the Ninth

Circuit; that he is a partner in the law firm of Vaughan, Brandlin, Baggot, Robinson & Roemer and one of the attorneys of record for the defendants known as the Stockholders' Protective Committee; that the Committee is composed of approximately 17 members, the names of which are known to the Appellate Court pursuant to the appeal which has already been heard and ruled upon in the above captioned matter.

That as was previously pointed out to the Court, this action centered around a proxy contest in which the aforementioned Stockholders' Protective Committee was contesting with the present Management of United Industrial Corporation for election to the Board of Directors of said corporation. The Stockholders' Protective Committee had accumulated over 1,200,000 votes, which were sufficient to constitute a majority of the number of votes likely to be cast at the annual meeting set for July 27, 1961. That in order to accumulate these votes, it was necessary to prepare, submit for comment of the Securities and Exchange Commission, and to print and mail the four solicitations which formed the basis of this action, and to perform other actions pertaining to the solicitation of proxies; all of which include the following:

a. Deliver the material to brokers, and make arrangements and pay for their transmittal to their customers, whose shares are held in "street names";

b. Employ and pay for a professional solicitor to arrange to obtain broker votes;

c. Conduct a long-distance telephone campaign throughout the country to obtain proxies not received by the mailing solicitations;

d. Tabulate proxies.

That the cost of preparing, printing and mailing the solicitation material in this proxy contest has already exceeded $35,000.00, which figure excludes all expenses and disbursements related to litigation incident to the proxy contest, including the appellate matters. Your affiant's law firm has performed many of the functions above described. The reasonable value of its services, also exclusive of services rendered in connection with any litigated matters, including appeals, exceeds the sum of $65,000.00.

In the event the proxies already obtained by the Stockholders' Protective Committee are invalidated, it is your affiant's opinion that because of the passage of time since the original solicitations, and the aggressive opposition of Management, that at least 3 new solicitations will be required to rekindle stockholders' interest to the extent of affirmatively re-executing proxies; the cost of such resolicitation could reasonably be expected to approximate the amount already expended as indicated above.

That affiant verily believes that a more practical method of accomplishing the same purpose as is embodied in the per curiam opinion of this Court would be to modify the present per curiam decision to permit the dissemination on the part of the Protective Committee of an additional letter to the stockholders, conveying to the stockholders the information embodied in subsections (i), (ii), (iii), (iv) and (v) of I, but at the same time permitting the Stockholders' Protective Committee to retain the proxies already solicited which are, of course, subject to revocation by any stockholder by merely signing a proxy on behalf of Management or by appearing at the meeting and voting in person; That the cost to the Stockholders' Protec-

tive Committee of such a proposal would be less than $10,000.00.

That the information required to be conveyed to the stockholders by the per curiam decision in order to correct any statements in any earlier communications or to make any earlier communications not false and misleading can be done quite simply in view of the information already conveyed to the stockholders by previous solicitation material of the appellant.

DATED: February 7, 1962.

/s/ J. J. BRANDLIN

Subscribed and Sworn to before me this 7th day of February, 1962.

/s/ MARY SUGAMURA,
Notary Public in and for said
County and State

MARY SUGAMURA
My Commission Expires May 14, 1965.

APPENDIX F.

Affidavit of Brigadier General Robert G. Ballance (U.S.M.C., Retired).

In the Supreme Court of the United States, October Term, 1961.

Stanley E. Henwood, et al., Defendants and Appellants, vs. Securities and Exchange Commission, Plaintiff and Appellee, and United Industrial Corporation, Defendant and Appelle. No. .....

State of California, County of Los Angeles—ss.

BRIGADIER GENERAL ROBERT G. BALLANCE, being first duly sworn, deposes and says:

(1) That he is a member of the Stockholders' Protective Committee of United Industrial Corporation and the owner of 1,400 shares of its common stock, all purchased prior to March 17, 1959.

(2) That he was a defendant in the above-entitled matter and is one of the appellants herein.

(3) That on June 7, 1961, he executed a blue proxy giving his proxies to the Stockholders' Protective Committee to be voted at the next annual meeting of United Industrial Corporation for the slate of directors proposed by said Stockholders' Protective Committee in opposition to the slate proposed by the present Management.

(4) That his said proxy was invalidated by an order of the United States District Court, Central Division, for the Southern District of California, in the above-entitled case.

(5) That at no time prior to said order, or since, has affiant authorized anyone to revoke or invalidate his proxy; nor is it affiant's intention or wish that said proxy be revoked or invalidated.

/s/ ROBERT G. BALLANCE,
Brigadier General Robert G. Ballance.

Subscribed and sworn to before me this 30th day of April, 1962.

/s/ MARY SUGAMURA,
Notary Public in and for said County and State.

MARY SUGAMURA
My Commission Expires May 14, 1965.

APPENDIX G.

Affidavit of Richard I. Roemer.

In the Supreme Court of the United States, October Term, 1961.

Stanley E. Henwood, et al., Defendants and Appellants, vs. Securities and Exchange Commission, Plaintiff and Appellee, and United Industrial Corporation, Defendant and Appellee, No. .....

State of California, County of Los Angeles—ss.

RICHARD I. ROEMER, being first duly sworn, deposes and says:

(1) That he is a member of the Stockholders' Protective Committee and a defendant and appellant herein.

(2) That upon receiving information that United Industrial Corporation intends to hold its 1962 annual meeting on May 9, 1962, affiant prepared and caused to be prepared certain proxy soliciting material which was mailed to the Securities and Exchange Commission on April 19, 1962, for their comment, pursuant to the Rules and Regulations promulgated under the Securities and Exchange Act of 1934.

(3) That on April 24, 1962, affiant received a telegram signed by Mr. Abraham Zwerling, Assistant Director, Division of Corporation Finance, advising affiant that the said proxy material should not be used and that a letter followed.

(4) That on April 25, 1962, affiant telephoned Mr. Abraham Zwerling, Assistant Director, Division of Corporation Finance. Mr. Zwerling advised affiant that it would be necessary for the Stockholders' Pro-

tective Committee to file a new proxy statement and revised Schedule 14B's concerning participants in the proxy contest and further advised affiant that the letter referred to in said telegram had not been completed as yet.

(5) That Mr. Zwerling asked affiant why the Stockholders' Protective Committee had waited so long before submitting its proxy material. Affiant stated that the Committee did not anticipate that the meeting would take place, since the Judgment in the above-entitled case had not become final and the Court of Appeals for the Ninth Circuit had ruled that no stockholders' meeting of any kind, except for adjournment, could be held until 60 days after the Judgment in the case at bar became final.

(6) That this conversation ended on the basis that the Securities and Exchange Commission did not agree that the meeting was improper and that before the appellants herein could solicit proxies, a complete revised proxy statement and Schedule 14B's would have to be filed, as well as revising the material heretofore submitted for comment.

(7) That on April 26, 1962, affiant again telephoned Mr. Zwerling for the purpose of reviewing affiant's position with regard to the pending annual meeting of United Industrial Corporation. Affiant stated that it was a physical impossibility for the Stockholders' Protective Committee to complete and process the documents necessary to solicit proxies for said 1962 meeting, in that there was insufficient time to accomplish the minimum requirements, as well as insufficient time to mail proxies and proxy material and allow for return of the proxies by those stockholders who wish to vote for the slate proposed by the Stockholders' Pro-

tective Committee. Mr. Zwerling agreed that it was a practical impossibility to complete the required work in time to properly solicit proxies for the annual meeting on May 9, 1962.

(8) That affiant stated to Mr. Zwerling that the present members of the Stockholders' Protective Committee, all stockholders of United Industrial Corporation, wished to continue soliciting the stockholders of said corporation for their proxies.

(9) That affiant stated that it was his opinion that not only was the meeting presently set for May 9, 1962, improperly called, but, further, that the Stockholders' Protective Committee had been induced to believe that such a meeting would not take place for the following reasons:

(a) That as of April 24, 1962, the mandate from the Court of Appeals for the Ninth Circuit had not been issued. That the appellants' petition for rehearing was denied on February 28, 1962. That under Rule 26 of the Rules of the Court of Appeals for the Ninth Circuit, the mandate would be due to issue on or about March 5, 1962; but in fact it did not issue. That the opinion of the Court of Appeals dated January 17, 1962, modified the judgment herein and stated that:

> ". . . . the defendant United Industrial Corporation, its officers, directors, employees, and attorneys, and each of them, be and they hereby are restrained and enjoined from holding any meeting of stockholders of United Industrial Corporation, except for the purpose of adjournment, until sixty days after this decree becomes final."

Hence, the Stockholders' Protective Committee believes that the meeting set for May 9, 1962, is in violation of said court order.

(b) In a mailing to stockholders of United Industrial Corporation dated March 6, 1962, Bernard Fein, President, stated:

> "The Court of Appeals has ordered that the adjourned annual meeting be held not earlier than sixty days after its decree becomes final. It is therefore not possible at this time to advise stockholders of the precise date on which the annual meeting will be held."

(10) That in regard to the last quoted statement from Management's letter of March 6, 1962, Mr. Zwerling stated that said quote referred to the "adjourned annual meeting" and that the meeting now set for May 9, 1962, is the 1962 annual meeting. Affiant stated to Mr. Zwerling that, in his opinion, this made the statement more false and misleading by reason of the fact that Management obviously never intended to hold the "adjourned annual meeting" and that the statement in the letter clearly implies that the meeting will be held at some future date. Mr. Zwerling stated that the paragraph in the letter quoted above was "unfortunate."

(11) That affiant then stated to Mr. Zwerling that Management's proxy statement for the 1962 annual meeting states, in effect, that there is no proxy contest in progress and that the Securities and Exchange Commission states that there is a proxy contest in progress and that the Commission did not agree with the statement in Management's 1962 proxy statement and termed that statement also "unfortunate."

(12) That affiant then requested Mr. Zwerling to request Management to continue the meeting set for May 9, 1962, for an additional 30 days, to the second

week in June, 1962, in order to give the Stockholders' Protective Committee time to properly solicit the proxies of the stockholders of the corporation. Affiant pointed out that the present situation was analogous to a situation that took place in Wilmington, Delaware, in April, 1961, wherein the Stockholders Protective Committee filed an action in the Court of Chancery, entitled *Dumont, et al. v. United Industrial Corporation,* the purpose of which was to obtain an injunction compelling Management to hold the annual meeting for 1961, pursuant to the By-Laws of the corporation. The Securities and Exchange Commission intervened in that matter in support of Management's contention that the 1961 meeting should be continued. Mr. Zwerling stated that this intervention was on the basis that the stockholders had not received adequate financial information about the company and that the present situation was, therefore, not analogous. Affiant stated that, in his opinion, this was not an ordinary situation and that the proxy contest involved herein was probably one of the longest and most bitterly fought in history. Mr. Zwerling agreed and stated that this was not an ordinary situation.

(13) Mr. Zwerling then asked affiant whether affiant wanted the Securities and Exchange Commission to file a lawsuit against Management to have the meeting adjourned. Affiant stated that this should be done only as a last resort, but that it should be done if the Commission was not able to persuade Management to voluntarily continue the meeting. Mr. Zwerling said that he would take the matter up with the General Counsel and would telephone affiant at a later date.

(14) On April 27, 1962, affiant received a tele-

phone call from Mr. Zwerling wherein Mr. Zwerling advised affiant that the General Counsel saw no basis for taking any action on this matter.

/s/ RICHARD I. ROEMER,

Subscribed and Sworn to before me this 30th day of April, 1962.

/s/ MARY SUGAMURA,
Notary Public in and for said County and State.

MARY SUGAMURA
My Commission Expires May 14, 1965.